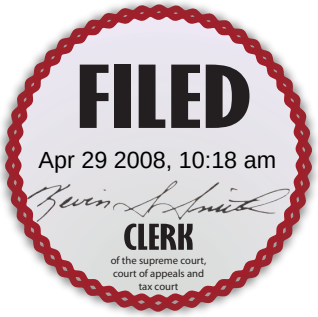

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IN THE
COURT OF APPEALS OF INDIANA

THOMAS POTTSCHMIDT, Appellant/Plaintiff/Cross-Appellee,	)	
vs.	)	No. 49A04-0710-CV-564
GDI CONSTRUCTION CORP., Appellee/Defendant/Cross-Appellant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0612-PL-51830

April 29, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Plaintiff/Cross-Appellee Thomas Pottschmidt appeals from the trial court's order granting Appellee/Defendant/Cross-Appellant GDI Construction's ("GDI") motion for summary judgment. Specifically, Pottschmidt contends that issues of material fact remain and thus the granting of GDI's motion for summary judgment was inappropriate. Pottschmidt also contends that, as a matter of law, an oral employment contract cannot be altered by a subsequent offer of employment letter. On cross-appeal, GDI challenges whether the trial court improperly dismissed its request for attorney's fees and costs incurred in defending Pottschmidt's claims. We affirm.

FACTS AND PROCEDURAL HISTORY

At some point prior to November 28, 2005, Pottschmidt engaged in at least three conversations with representatives from GDI regarding a position as a senior project manager. During these conversations, the parties discussed the nature of the position, compensation, and employment benefits. On November 28, 2005, GDI sent a letter to Pottschmidt offering him the senior project manager position. The letter set forth the terms of employment (*i.e.*, compensation and employment benefits) offered by GDI. This letter provided that Pottschmidt would receive two weeks of paid vacation per year and that he would be eligible for an annual bonus at the company's discretion. Pottschmidt's first day of employment was December 12, 2005. GDI terminated Pottschmidt's employment on November 17, 2006.

Pottschmidt filed a complaint for damages on December 22, 2006, alleging that GDI violated the Indiana Wage Claim Statute. On February 12, 2007, GDI filed its answer, affirmative defenses, and counterclaim. Also on February 12, 2007, GDI filed a

motion for summary judgment. On May 21, 2007, Pottschmidt filed his cross-motion seeking partial summary judgment.[1] On June 15, 2007, the trial court conducted a hearing on the parties' summary judgment motions. On June 19, 2007, the trial court issued an order granting GDI's motion for summary judgment, denying Pottschmidt's motion for summary judgment, and dismissing GDI's counterclaim.

On July 19, 2007, Pottschmidt filed a Motion to Correct Error. GDI filed its response in opposition to Pottschmidt's motion on August 6, 2007. The trial court denied Pottschmidt's motion after hearing oral arguments on the matter on August 31, 2007. This appeal follows.

DISCUSSION AND DECISION

Pottschmidt contends that summary judgment was improper because genuine issues of material fact exist regarding whether GDI breached the alleged oral, at-will employment contract entered into with Pottschmidt by failing and refusing to compensate him for the additional vacation time he claims to have accrued under the alleged oral employment agreement. GDI responds that no breach occurred because even if the parties' discussions prior to its offer of employment to Pottschmidt created an oral contract, the terms provided in the offer of employment letter sent to Pottschmidt by GDI control.

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[1] The parties indicate that Pottschmidt's cross-motion for summary judgment was filed on May 21, 2007. However, there is no file stamp on the copy of the motion included in Pottschmidt's appendix. The chronological case summary prepared by the trial court indicates that Pottschmidt's motion was filed on May 31, 2007.

Upon reviewing the grant or denial of summary judgment, our standard of review is well-settled.

> Summary judgment is appropriate only if the pleadings and evidence sanctioned show there is no genuine issue as to any material fact and … the moving party is entitled to judgment as a matter of law. When reviewing a summary judgment ruling, we stand in the shoes of the trial court. We do not weigh the evidence, but construe the pleadings and designated materials in a light most favorable to the non-movant. The party appealing the grant of summary judgment has the burden of persuading the court that the grant of summary judgment was erroneous. The trial court's determination is carefully scrutinized to assure that the party against whom summary judgment was entered is not improperly prevented from having its day in court.

Wallem v. CLS Indus., 725 N.E.2d 880, 883 (Ind. Ct. App. 2000) (citations omitted). We will affirm the trial court's grant of summary judgment on any theory or basis found in the record. *Rodriguez v. Tech Credit Union Corp.*, 824 N.E.2d 442, 446 (Ind. Ct. App. 2005).

A. Formation of Oral Contract

It is fundamental that a contract is formed by the exchange of an offer and acceptance between contracting parties. *Wallem*, 725 N.E.2d at 883. Contract formation requires mutual assent on all essential contract terms. *Buschman v. ADS Corp.*, 782 N.E.2d 423, 428 (Ind. Ct. App. 2003). Assent to the terms of a contract may be expressed by acts which manifest acceptance. *Id.* A meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract. *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005). The failure to demonstrate an agreement on essential terms of a purported contract negates mutual assent and hence there is no contract. *Wallem*, 725 N.E.2d at 883. The question of

whether a certain or undisputed set of facts establishes a contract is one of law. *Fox Dev.*, 837 N.E.2d at 165.

Here, the evidence designated by Pottschmidt indicates that GDI did not share Pottschmidt's interpretation of the amount of vacation time awarded under the employment contract. The evidence establishes that the parties discussed employment benefits before the formation of an employment relationship. During these discussions, Pottschmidt apparently proposed contract terms and his claim is based solely on his assumption that GDI agreed to his proposed terms. Pottschmidt further asserts that not only was he awarded two weeks of vacation time during his first year of employment at GDI, he was also accruing an additional two weeks of vacation time during the course of his first year of employment. Thus, he claims that he was therefore entitled to payment for the allegedly accrued vacation time upon his termination from GDI.

Pottschmidt however, has failed to designate any evidence showing that any alleged agreement between himself and GDI concerning the accrual of additional vacation time ever existed, nor did he provide any evidence indicating the rate at which he accrued the additional vacation time. Because Pottschmidt has failed to provide us with any designated evidence supporting his claim, we are unwilling to hold that Pottschmidt's mere proposal regarding paid vacation time, without any evidence of acceptance, creates a binding contract which obligates Pottschmidt to be paid pursuant to his proposal. *Wallem*, 725 N.E.2d at 883-84. As a result, we conclude that the designated evidence does not establish that GDI assented to the alleged agreement allowing Pottschmidt to accrue additional paid vacation time. Rather, the evidence

merely indicates that GDI granted Pottschmidt two weeks of vacation per year during the course of his employment.

Because a meeting of the minds of the contracting parties, encompassing the same intent, is essential to the formation of a contract, we must determine whether the evidence outlined above establishes that there was a meeting of the minds or mutual assent between Pottschmidt and GDI on the essential issue of the amount of annual paid vacation time granted annually to Pottschmidt as a benefit of employment. *See Fox Dev*., 837 N.E.2d at 165; *Buschman*, 782 N.E.2d at 428. Here, we conclude that the designated evidence fails to establish that Pottschmidt reached an agreement with GDI on all the essential terms of the contract, namely the amount of annual paid vacation time to which he was entitled. We therefore conclude, as a matter of law, that the trial court properly granted summary judgment on this claim because Pottschmidt failed to demonstrate an agreement on the essential terms of the purported contract, and, as a result, the purported contract lacks mutual assent. *Wallem*, 725 N.E.2d at 883-84.

Furthermore, to the extent that Pottschmidt claims that he was entitled to a bonus under the alleged oral employment contract, Pottschmidt has failed to designate any evidence showing that he was automatically entitled to a bonus despite the ensuing circumstances. Notably, Pottschmidt's affidavit establishes, on its face, only that he may be entitled to a bonus if GDI were profitable and that the amount of any bonus would be based upon GDI's performance and his contribution to that performance. Pottschmidt has failed to designate any evidence showing that GDI was profitable during the course of his employment even though his own affidavit establishes that any alleged agreement

concerning his receiving a bonus was not automatic, but rather was dependent upon GDI being profitable. Because Pottschmidt has failed to designate any evidence suggesting that GDI was profitable during the course of his employment, his claim that he was entitled to a bonus must fail. Because we conclude, as a matter of law, that the parties lacked the required mutual assent on essential terms of the alleged oral contract, and as a result, no oral contract was formed, we need not address Pottschmidt's contention that, as a matter of law, an oral employment contract cannot be altered by a subsequent written offer of employment.

B. Attorney's Fees

On cross-appeal, GDI challenges the trial court's dismissal of its request for an award of attorney's fees. GDI specifically contends that it is entitled to an award of sanctions against Pottschmidt and his counsel "because of their continued litigation of a frivolous, unreasonable, and groundless wage claim." Appellee's Brief at 9. Generally, Indiana adheres to the "American Rule" with respect to the payment of attorney's fees, which requires each party to pay his or her own attorney's fees absent an agreement between the parties, statutory authority, or rule to the contrary. *Breining v. Harkness*, 872 N.E.2d 155, 161 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. Indiana Code section 34-52-1-1(b) provides the following:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that each party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.

We review the trial court's legal conclusion that a party litigated in bad faith or pursued a frivolous, unreasonable, or groundless claim or defense *de novo*. *Breining*, 872 N.E.2d at 161.

> A claim or defense is "frivolous" if it is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. … A claim or defense is "unreasonable" if, based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim or defense was worthy of litigation. … A claim or defense is "groundless" if no facts exist which support the legal claim presented by the losing party.

Kahn v. Cundiff, 533 N.E.2d 164, 170-71 (Ind. Ct. App. 1989), *adopted on trans.*, 543 N.E.2d 627 (Ind. 1989) (citations omitted). A claim or defense is not frivolous merely because a meritorious action proved unsuccessful or where a legitimate attempt has been made to establish a new theory of law or where a good faith effort is made to extend, modify, or reverse existing law. *Id*. at 170.

Although a close call, we are not prepared to conclude that Pottschmidt's continued litigation was frivolous, unreasonable, groundless, or pursued in bad faith to the extent that it merits sanctions. We therefore affirm the trial court's dismissal of GDI's request for an award of attorney's fees.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.